IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 60/2004

1.Shri Ramkrishna V. Usgaonkar
(since expired) through his legal heirs

(a) Smt. Cussum @Janaki R. Usgaonkar,
widow of Ramkrishna V. Usgaonkar,
aged 68 years,

(b) Shri Mahendranath R. Usgaonkar,
son of Ramkrishna V. Usgaonkar,
age 40 years, Civil Engineer,

(c) Smt. Kalpana M. Usgaonkar,
wife of Mahendranath R. Usgaonkar,
age 36 years, housewife,

(d) Shri Satyendranath R. Usgaonkar,
son of Ramkrishna V. Usgaonkar,
38 years, businessman,

(e) Smt. Vandana S. Usgaonkar, wife
of Satyendranath R. Usgaonkar,
age 35 years, housewife,

(f) Shri Gajendranath R. Usgaonkar,
age 42 years, business,

All of them residing at 20th January Road,
Altinho, Panaji, Goa. ..... Appellant.

V/s.

Panaji Municipal Council,
represented by its Chief Officer,
having his Office at Panaji. ..... Respondent.

Mr. D.P. Bhise, Advocate for the appellants.

Miss. S. Linhares, Advocate for the respondent.

CORAM : P.V. HARDAS, J.

DATE : AUGUST 13, 2004.

ORAL ORDER :

This second appeal has been filed at the instance of the original plaintiff. The Regular Civil Suit No. 5/96/B filed by the plaintiff, came to be dismissed by the Civil Judge, Jr. Division, Panaji by Judgment and Decree dated 25/4/2002 and confirmed by the appellate Court by Judgment and Decree dated 20/11/2003, in Regular Civil Appeal No.89/2002. The appellant, therefore, assails the concurrent findings of fact arrived at by the two Courts below.

2. The original appellant/plaintiff had filed a suit for declaration, permanent injunction and consequential reliefs to declare that the appellant has a right of access to enter the suit property through the western boundary of the respondent's plot bearing Chalta No.27 of P.T.Sheet No.74 and restrain the respondents, their agents, servants, contractors, labourers or any other person or persons in any manner from interfering with the existing access to the suit property through eastern boundary, which access admeasures 8 metres and which had been in existence since time immemorial. The trial Judge, before whom the suit was tried, framed issues as to whether the plaintiff proves that he enjoys a motorable access through Chalta No.27 for last more than

60 years and does the plaintiff prove that this is the only access to go to his property. The trial Judge further framed issues as to whether the plaintiff proves that the defendant was constructing a compound wall around Chalta No.27 and whether the defendant proves that the plaintiff has an alternate access from the side of Sangam Lodge. The trial Court recorded a finding in the negative in respect of the first two issues, namely whether the plaintiff proves that he enjoys a motorable access and whether the plaintiff proves that it is the only access to go to his property. In respect of the third and fourth issues, namely whether it was proved that the defendant was constructing a compound wall and whether the defendant proved that the plaintiff had an alternate access, the trial Judge recorded a finding in the affirmative. On consideration of the evidence of the parties, the trial Judge dismissed the suit filed by the plaintiff.

3. The appellant/plaintiff being aggrieved by the dismissal of the suit, filed a Regular Civil Appeal No.89/2002 which also came to be dismissed by the IInd Additional District Judge, Panaji by Judgment and Decree dated 20.11.2003. The appellate Court found that the appellant had failed to prove that he had been using the access continuously, openly, peacefully and uninterruptedly for the last more than 60 years as a matter of right. The appellate Court also found that the suit was bad for want of issuance of notice under Section 289 of the Municipalities Act. The appellate Court, therefore, dismissed the appeal.

The appellate Court, on consideration of the evidence of the appellant and the respondent, has held "Thus it follows from these observations that though appellant had been using the said access through the property of respondent, in the light of evidence of DW.1 Shri Ashok Kamatar, it becomes apparent that such use was merely permissive use and not otherwise. Thus, it is follows that appellant cannot claim and permissive use as an easemetary right by prescription having enjoyed him as of right." The appellate Court, in para (11) of the Judgment, has held that the plaintiff in his evidence had not stated anything about issuance of a notice under Section 289 of the Municipalities Act which was mandatory before institution of the suit and endorsed the finding of the trial judge that the suit was not maintainable in the absence of issuance of such a notice.

4. In the second appeal, the following substantial questions of law have been raised which are reproduced below on which reliance is placed by the learned Counsel for the appellant.

(a) Whether enjoyment of suit access openly, peacefully, uninterruptedly and continuously for more than 60 years by the plaintiff and other residents without any restriction from defendant is not a prescriptive easement as of right ?

(b) Whether the appellant is entitled for declaration of

perspective easementary right to suit access in terms of Articles 2143 read with 2309 of Portuguese Civil Code and Section 15 of the Indian Easements Act ?

(c) Whether absence of any objection for not issue of notice under Section 289(1) of the Municipalities Act, before grant of temporary injunction, would not amount to waiver of notice ?

5. The substantial questions of law, as framed, relate to appreciation of evidence by the two Courts below. No perversity has been pointed out in respect of the reasoning of the trial Court. Nor is it pointed out that certain evidence has been overlooked by the two Courts below, but all that is urged is that the two Courts below have not appreciated the evidence of the appellant/plaintiff in its proper perspective. It is not possible in a second appeal to reappreciate the evidence and arrive at a different conclusion than the conclusion arrived at by the two Courts below, unless and until it is established that there is a perversity in the reasoning of the two Courts below, either by taking into consideration inadmissible evidence/document or overlooking and ignoring vital evidence/document which would affect the reasoning and the finding arrived at by the Court. This is not the situation in the present second appeal and, therefore, according to me, the substantial questions of law which are urged in the second appeal

revolve around the appreciation of the evidence of the two Courts below. The two Courts below, on the basis of the evidence on record, have recorded a finding and, according to me, no ground has been made out for interfering with the Judgment and Decree of the two Courts below.

6. The learned Counsel appearing on behalf of the appellant has placed reliance on a Judgment of the learned Single Judge of this Court reported in ***Anant Lakshiman Lad and 6 ors. vs. Yeshodi Deuli & 2 ors.,*** 1990(1) Goa Law Times (264) to state that it was not necessary for a party to expressly plead that the party has acquired title by prescription, provided the material facts constituting ingredients of the prescription are averred by him. In my opinion, the facts of the Judgment which is cited above, do not apply to the facts of the present case.

7. In the result, therefore, this second appeal which is devoid of any merit, is dismissed in limine with no order as to costs.

P.V. HARDAS, J.

ssm.